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SUPREME COURT, U.S.

No. 81-6782

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

MICHAEL MACK,

Petitioner,

-vs-

STATE OF OKLAHOMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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9

July, 1982

QUESTION PRESENTED FOR REVIEW

1. Whether a Writ of Certiorari should be granted when other State Appellate Court rulings are not inconsistent on the issue of retroactivity of this Court's ruling in Carter v. Kentucky?

2. Whether this Court's ruling in Carter v. Kentucky should be applied retroactively?

3. Whether a Writ of Certiorari should be granted if a finding of retroactivity would not affect this defendant?

I N D E X

Subject Index

	Page
Question Presented for Review	1
Opinion Below	1
Jurisdiction	1
Statement of the Case	2
Summary of the Argument	6
Reasons for Denying the Writ	
THE OKLAHOMA COURT OF CRIMINAL APPEALS DECISION IN MACK v. STATE IS NOT INCONSISTENT WITH OTHER STATE APPELLATE COURT RULINGS ON THE ISSUE OF RETROACTIVITY OF CARTER v. KENTUCKY.	7
THIS COURT IN CARTER v. KENTUCKY DID NOT EXPRESSLY HOLD THE RULING TO BE RETROACTIVE AND THE RULING SHOULD BE APPLIED ONLY PROSPECTIVELY.	7
THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE A FINDING OF RETROACTIVITY WOULD NOT AFFECT THIS DEFENDANT.	15
Conclusion	15
Affidavit of Service	16

Cases Cited

Brannin v. State, 375 P.2d 276 (Okl.Cr. 1962)	10,13
Brown v. Lousiana, 447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 159 (1980)	8
Bruno v. United States, 308 U.S 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939)	9
Carter v. Kentucky, 450 U.S.288 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981)	5,7,9, 10,11,12, 13,14,15
Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)	8
Desist v. United States, 394 U.S. 224, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969)	8
Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963)	1,13
Dunaway v. New York, 422 U.S. 200 (1979)	8
Ellis v. State, 558 P.2d 1191 (Okl.Cr. 1977)	10,13
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	13
Gosa v. Mayden, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973)	10

Cases Cited	Page
Griffin v. California, 380 U.S. 609, 85 S.Ct. 1228, 14 L.Ed.2d 106 (1965)	9,10,11 12,14
Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961)	13
Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1773, 12 L.Ed.2d 908 (1964)	13
Johnson v. New Jersey, 384 U.S. 368, 84 S.Ct. 1773, 12 L.Ed.2d 908 (1964)	13
Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978)	9,10,11
Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965)	8,12
Mack v. State, 641 P.2d 1122 (Okl.Cr. 1982)	1
Mosely v. State, 402 So.2d 559 (Fla. App. 1981)	7
O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291	10
O'Conner v. Parker, 382 U.S. 286, 86 S.Ct. 445, 15 L.Ed.2d 337 (1966)	14
People v. Crawford, 632 P.2d 626 (Colo. App. 1981)	7
People v. Silver, 121 Cal. App.3d 533, 175 Cal. Rptr. 483 (1981)	7
Richardson v. State, 402 So.2d 848 (Miss. 1981)	7
Ruhm v. Turner, 357 F.Supp. 324 (W.D. Okl. 1973)	10,13
Spinelli v. United States, 393 U.S. 410 (1969)	8
Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)	11,12,13
Tehan v. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966)	11,13,14
United States v. Johnson, ____ U.S. ____, S.Ct. ____, ____ L.Ed.2d ___ (June 21, 1982)	8,9
United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981)	11
United States v. United States Coin & Currency, 401 U.S. 715 (1971)	9
Villines v. State, 492 P.2d 343 (Okl.Cr. 1971)	10,13

Statutes Cited	
22 O.S.1971, § 701	2,10,13

United States Constitution

U.S. Const. amend. V 1

U.S. Const. amend. XIV, § 1 2

United States Code

28 U.S.C. § 1257 (3) 2

Other Authority Cited

The Annotation, Prospective or Retroactive Operation of Overruling Decision, 10 A.L.R.3d § 1371 7

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MACK, Petitioner,	)	
v.	)	No. 81-6782
STATE OF OKLAHOMA, Respondent.	)	

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, State of Oklahoma, by and through Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court to deny the Petition for Writ of Certiorari seeking review of the Opinion of the Oklahoma Court of Criminal Appeals entered on March 2, 1982, and to which rehearing was denied on March 25, 1982.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals is reported as Mack v. State, 641 P.2d 1122 (Okl.Cr. 1982).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on March 2, 1982. A petition for rehearing was denied on March 25, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself. . . ."

The Fourteenth Amendment to the United States Constitution states in pertinent part:

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28 U.S.C. § 1257(3) states:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . . .

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Title 22 O.S. 1971, § 701, provides:

"In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court or committing magistrate in this State, the person charged shall at his own request, but not otherwise, be competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel it shall be ground for a new trial.

STATEMENT OF THE CASE

On June 18, 1979, at approximately 9:00 p.m., Paula Ruth Perkins, left the Crystal City Bowling Alley and drove to the opposite end of the shopping center to the car wash (Tr. 14-15). She began vacuuming the backseat of her car when she felt someone approach and press against her leg (Tr. 15). She straightened up and the petitioner (herein referred to as the defendant) put a gun to her head. He told her to get into her car and not to say anything or he would kill her (Tr. 16). Paula could see the dark gun next to her temple, so she did what the defendant told her to do (Tr. 16).

Paula, as instructed, entered the backseat and put her face down in the seat (Tr. 16). She could hear more than one voice, but when she looked to see who was in her car, she was hit in the back of the head with an object that felt like the gun (Tr. 17). The defendant, Bobby Trimble and their friend, Gator, drove around for an hour and a half and the defendant used Paula's key ring, which had a mace can on it. Finally the defendant stopped on a dark road, and told Paula, whose head was bleeding, to get out of the car and not to look at them (Tr. 18). Again, Paula did as she was instructed, because she was afraid of these men.

After leaving the car, which contained her purse and keys, Paula started walking towards the lights of the town (Tr. 18). She walked to Jerry Harmons' house, where the Harmons family were sitting outside watching T.V. (Tr. 19). She told Mr. Harmons what happened and he called the police and an ambulance for Paula because her head was still bleeding (Tr. 19).

Later, the police arrived, and Paula gave them a description of her car, which was a 1973 Buick Apollo, white over blue (Tr. 123). Her car was also noticeable because it had four bumper stickers which read: Channel 2; Eight's the Place; I'm Creek Indian and Proud of It; and Fried Bread Power (Tr. 20).

Officer Cleary heard a radio dispatch on Paula's vehicle which included a description of the vehicle (Tr. 31). At approximately 1:10 a.m., he saw this described vehicle going the opposite direction (Tr. 33). He immediately turned around and observed this vehicle turn into the parking lot of the Soul Brother's Lounge (Tr. 34). Officer Cleary arrived at this parking lot as the only two people in the lot were walking towards the entrance of this club (Tr. 34). The defendant entered the club but exited immediately because he was not allowed in this club because of his attire (Tr. 36). Bobby Trimble followed the defendant into the parking lot (Tr. 38). Officer Cleary radioed for Officer Carter to back him up and then he frisked the defendant as a safety precaution. During the frisk, Officer Carter found a small can of mace on the defendant (Tr. 56). Officer Carter, also found a weapon on the sidewalk and he called the Canine Unit to the Lounge (Tr, 60).

A dog was needed to track the area to determine if anyone fled through the field next to the Lounge (Tr. 38). The dog, which was trained to pick up the freshest scent by tracking the skin cells that fall off a person, did not detect any scent which led into the field (Tr. 74). Rather, the scent the dog found led from Paula's vehicle into the Lounge (Tr. 39, 74). The defendant and Bobby Trimble were arrested for the crime charged.

Bobby Trimble confessed to the officers and he took the stand at the defendant's trial to testify on behalf of the State. He stated that he and the defendant walked around the Crystal City Shopping Center until they observed Paula vacuuming her car (Tr. 80). The defendant then pulled a gun from his waistband and forced Paula into the backseat of her car (Tr. 80). Gator, their friend, sat in the backseat with Paula, the defendant drove, and Trimble sat in the front seat. Bobby Trimble confessed to going through Paula's purse, taking $2.00 and taking the mace can. He also testified that they dropped Gator off before turning into the Lounge and that the defendant, when he saw a police car, threw the gun under the car as they exited Paula's car at the Lounge (Tr. 84,88).

Bobby Trimble stayed six days in the County Jail prior to imprisonment in the juvenile system (Tr. 90). During the six days, the defendant sent a note to Bobby in a cigarrette package (Tr. 90-93). The note instructed Bobby to tell the officers that they were walking, found this car with the keys in it and then drove it to the Lounge (Tr. 92,93). Bobby gave this note to his attorney and refused to tell this story (Tr. 91).

After the State rested its case, the defense presented the defendant's mother and the defendant's girlfriend as alibi witnesses. The defendant did not testify and he orally requested a cautionary instruction on his failure to testify at trial. However, the defendant never sought a ruling on his requested instruction and he failed to submit this requested instruction in

writing to the Court.[1] The instruction was not given. The jury deliberated and found the defendant guilty of Robbery With Firearms in the first stage of trial. In the second stage of trial, the State presented the defendant's prior Judgment and Sentence in CRF-78-3188 for Larceny of Merchandise from a Retailer. The jury again deliberated and set the punishment for the defendant at sixty (60) years in the custody of the Department of Corrections.

The defendant appealed this conviction to the Oklahoma Court of Criminal Appeals. While the appeal was pending, this Court announced its decision in Carter v. Kentucky, 450 U.S. 288 (1981), which held that the failure to deliver a cautionary jury instruction on the defendant's failure to testify, where requested, violated the Fifth Amendment which is applicable to the states through the Fourteenth Amendment. The Oklahoma Court of Criminal Appeals held that it was bound by the decision of this Court in Carter. However, since this Court did not hold that the decision was retroactive and because such instructions were held in Oklahoma to be reversible error at the time the defendant was tried, the state court held that the decision in Carter, should only be applied prospectively. The defendant's conviction was affirmed and a petition for rehearing was denied.

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1. See United States v. Greer, 588 F.2d 1151 (6th Cir.) cert. denied, 440 U.S. 3 99 S.Ct. 1794, 60 L.Ed.2d 244 (1979) where the defendant in writing requested a no-inference instruction but he never made timely objection when the judge overlooked the instruction. Such was held not to be plain or reversible error. See also Teague v. State, 287 S.E.2d 111 (Ga.1982); Tugatuk v. State, 626 P.2d 95 (Ala. 1981); United States v. Williams, 521 F.2d 950 (D.C. Cir. 1975).

SUMMARY OF ARGUMENT

The Oklahoma Court of Criminal Appeals held that the ruling in Carter v. Kentucky should be applied prospectively because this Court did not expressly clarify whether the ruling was retroactive. The Oklahoma Court of Criminal Appeals is the only state court that has addressed this issue, thus there are no inconsistent rulings between the highest state courts.

The ruling in Carter v. Kentucky, which is the first ruling to hold that the Fifth and Fourteenth Amendments require a no-inference instruction, if requested by the defendant, should not be applied retroactively because it is in the category of cases, which express a new principle of law and overruled past precedent and which usually are not retroactive. Furthermore, the factors such as the purpose of the new ruling, the extent of reliance on the previous law and the impact of a retroactive application of the new constitutional principle on the administration of justice are persuasive for not apply the ruling in Carter v. Kentucky retroactively.

Moreover, the ruling in Carter v. Kentucky is a limited Fifth Amendment protection because such an instruction is not required unless it is requested by the defendant and it differs in its enhancement of the reliability of the fact finding process from the blanket Fifth Amendment protection against adverse inferences found in Griffin v. California. Therefore, the holding in Carter does not require the same degree of retroactivity as afforded Griffin.

However, if this Court is of the opinion that Carter should be accorded some amount of retroactivity, this Court should not exercise its discretionary jurisdiction in the present case because such a ruling would not affect the defendant's conviction since his claim should have been barred based on a state procedural rule. Accordingly, this Court should dismiss this defendant's writ of certiorari.

I

THE OKLAHOMA COURT OF CRIMINAL APPEALS DECISION IN MACK v. STATE IS NOT INCONSISTENT WITH OTHER STATE APPELLATE COURT RULINGS ON THE ISSUE OF RETROACTIVITY OF CARTER v. KENTUCKY.

The defendant asserts that the Oklahoma Court of Criminal Appeals decision, in the instant case, is inconsistent with decisions of other State Appellate Courts and therefore the Writ of Certiorari should be granted.

The State submits that the decisions in People v. Crawford, 632 P.2d 626 (Colo. App. 1981) and Mosely v. State, 402 So.2d 559 (Fla. App. 1981) are not inconsistent with the opinion of the Oklahoma Court of Criminal Appeals, because the opinions in those cases do not expressly state whether these cases were tried prior or subsequent to Carter v. Kentucky, 450 U.S. 288 (1981). Moreover, neither of these courts nor the courts in Richardson v. State, 402 So.2d 848 (Miss. 1981) or People v. Silver, 121 Cal. App.3d 533, 175 Cal.Rptr. 483 (1981) addressed the issue of retroactivity of the ruling in Carter v. Kentucky. Accordingly, the State Appellate Courts are not inconsistent on the issue of retroactivity of the ruling in Carter v. Kentucky, and therefore the writ of Certiorari should be denied.

II

THIS COURT IN CARTER v. KENTUCKY DID NOT EXPRESSLY HOLD THE RULING TO BE RETROACTIVE AND THE RULING SHOULD BE APPLIED ONLY PROSPECTIVELY.

The defendant asserts that the state court's ruling in the present case is inconsistent with the principles established by this Court and the Carter ruling should be applied retroactively at least to cases pending direct review, such as the defendant's.

The Oklahoma Court of Criminal Appeals was entitled to reach its own conclusion as to the issue of retroactivity because this Court did not expressly clarify whether the decision was retroactive. In Ruhm v. Turner, 357 F.Supp. 324, 326 (W.D. Okl. 1973) the Federal District Court cited The Annotation, Prospective or Retroactive Operation of Overruling Decision, 10 A.L.R.3d § 1371, when it stated:

> "'Moreover, although there has traditionally been a presumption that an overruling decision is intended to receive general retroactive effect, the more modern view is that unless the overruling court expressly indicates in the overruling case to what extent the overruling decision is to be given retroactive effect, lower courts are entitled to reach their own conclusions as to the issue of retroactivity until the overruling court expressly clarifies how much retroactive effectd its overruling decision is to receive.' (emphasis supplied)."

Further, this Court in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965) concluded "that the Constitution neither prohibits nor requires [that] retroactive effect" be given to any "new" constitutional rule. 381 U.S. at 629; Brown v. Louisiana, 447 U.S. 323, 327, 100 S.Ct. 2214, 2219, 65 L.Ed.2d 159 (1980). This Court further stated in Johnson v. New Jersey, 384 U.S. 719, 728, 86 S.Ct. 1172, 1778, 16 L.Ed.2d 882, 889 (1966):

> "'[T]he retroactivity or non-retroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.'"

The determination of whether a decision should be accorded retroactive or prospective application focuses upon three categories of cases. United States v. Johnson, ____ U.S. ____, _____ S.Ct. _____, ____ L.Ed.2d _____ (June 21, 1982). First, if the case applied settled precedent to new or different factual situation, then the Court's decision usually applies retroactively. Id. See, e.g., Dunaway v. New York, 422 U.S. 200, 206 (1979); Spinelli v. United States, 393 U.S. 410, 412 (1969). Second, is the group of cases where this Court has expressed a new principle of law by either overruling past precedent on which the litigants relied or by deciding issues of first impression whose resolution was not clearly foreshadowed. Chevron Oil Co. v. Huson, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). Such cases are usually nonretroactive. See Desist v. United States, 394 U.S. 224, 248, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). The third type of cases are cases where the trial court lacked authority to convict or punish the criminal defendant. United States v.

Johnson, supra. This group of cases is usually accorded full retroactivity. Id. See, e.g., United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971).

The petitioner's case fits into the second category of cases, which usually are not retroactive, because this Court's ruling in Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981) announced a new principle of law and it overruled past precedent on which the litigants relied. In Carter, this Court held that the Fifth and Fourteenth Amendments of the Constitution required a court to give the jury an instruction, when requested, that no adverse inferences are to be drawn when the defendant decides not to testify at his trial.

Although, the Court in Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939), held that in accord with the federal statute 28 U.S.C. § 632, which provided that the defendant's failure to testify "shall not create any presumption against him," the defendant had the right to have the jury instructed that his failure to testify did not create any presumption against him, the Court in Bruno did not reach the Fifth Amendment issue presented in Carter. Rather, this Court in Bruno merely resolved a question of federal statutory law. This Court's announcement in Carter was a new ruling and one not previously addressed by this Court because the Federal Act of March 16, 1878 did not govern the instructions in state courts. See dissent in Carter v. Kentucky, 405 U.S. at 308 (Rehnquist, J., dissenting).

In Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), this Court expressed the opinion that the trial judge was prohibited under the Fifth Amendment and the Fourteenth Amendment from asking the jury to draw adverse inferences from the defendant's failure to take the witness stand.

Subsequently, in Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978), this Court led states to believe that the Fifth Amendment did not require a "no inference" instruction but rather such could be decided by the state law although it held that such instructions did not violate the Fifth and Fourteenth Amendments:

> "It may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection. And each State is, of course, free to forbid its trial judges from doing so as a matter of state law. We hold only that the giving of such an instruction over the defendant's objection does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments." (Emphasis added).

See also Justice Stewart's dissenting opinion in Griffin v. California, 380 U.S. 609 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), which provided, "The formulation of procedural rules to govern the administration of criminal justice in the various states is properly a matter of local concern." 380 U.S. at 623.

Thus, since there has been no expressed ruling that the Fifth and Fourteenth Amendment required such an instruction, whether requested or not, Oklahoma relied on its statutes which prohibited any comment on the defendant's failure to take the stand. See 22 O.S.1981, § 701. The Court's ruling in Carter overturned a longstanding and widespread practice which the Oklahoma Court of Criminal Appeals had expressly approved. 22 O.S.1981, § 701; Ellis v. State, 558 P.2d 1191 (Okl.Cr. 1977); Villines v. State, 492 P.2d 343 (Okl.Cr. 1971); Brannin v. State, 375 P.2d 276 (Okl.Cr. 1962); Russell v. State, 17 Okl.Cr. 164, 194 P. 242 (1921). The decision affects a decisional change in attitude that prevailed for many decades. See, e.g. Gosa v. Mayden, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973) (which held that O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969) was nonretroactive when it did not overrule any prior decision but announced a new constitutional principle because of the increasing awareness and recognition of the important constitutional values embodied in the Fifth and Sixth Amendments).

Accordingly, this case fits clearly into the group of cases which expresses a new principle of law or an issue of first impression. Further, this new ruling overrules prior state law and statutes relied upon by the litigants. 22 O.S.1981, § 701; Ellis v. State, 558 P.2d 1191 (Okl.Cr. 1977); Villines v. State, 492 P.2d 343 (Okl.Cr. 1971); Brannin v. State, 375 P.2d 276 (Okl.Cr. 1962); Russell v. State, 17 Okl.Cr. 164, 194 P. 242 (1921). The

decision in Carter did not merely restate existing law or apply the established law to a set of facts different from the original set of facts. See United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981). Accordingly, the present case falls into the second category of cases, which usually are not retroactive.

The next part of the retroactive test, consists of an evaluation of the factors provided in Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967). These consist of: the purposes of the new ruling, the extent to which law enforcement authorities may have relied upon the previous state law and the impact of a retroactive application of the new federal constitutional principle on the administration of justice. 388 U.S. at 297, 18 L.Ed.2d 1199.

Retroactively or non-retroactivity of a new constitutional rule does not turn on the value of the constitutional guaranty involved but rather on the constitutional rule or procedure, its background of precedent, its function, its impact on the administration of justice and the way these factors combine. Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). The issue of retroactivity must be determined in this case by looking at the peculiar traits of the specific rule in question.

First, the purpose of the rule that a no inference instruction should be given when requested "is to remove from the jury's deliberations any influence of unspoken adverse inferences." Lakeside supra, at 339, 55 L.Ed.2d 319, 98 S.Ct. 1091. In Tehan v. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453 (1966) this Court stated:

> ". . . the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values - values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect."

This Court in Tehan found that the new rule announced in Griffin pertained to the Fifth Amendment privilege against self-incrimination and such was not an adjunct to the ascertainment of truth, thus full retroactivity of the new rule was not required.

Further, in Carter v. Kentucky, this Court did not decide that in all criminal cases, where the defendant decides not to take the stand, that a no-interference instruction is required under the Fifth Amendment, but rather only where the defendant requests such an instruction. Therefore, this type of instruction does not greatly affect or substantially impair the very integrity of the fact finding process" because if it did, such an instruction would be required in all similar criminal cases. See Linkletter, supra. Thus, the purpose of the new rule can be achieved without applying the rule retroactively.

Further, in Stovall v. Denno, 388 U.S. 293, 97 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) where the only prospective application of a rule was applied, this Court stated:

> "Although the Wade and Gilbert rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, 'the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.' Johnson v. New Jersey, supra, 384 U.S. 728, 729, 16 L.Ed.2d at 869."

The Carter ruling was that a no-inference instruction is required by the Fifth Amendment only, when requested, by the defendant. Thus, the instruction is only mandatory to assure the integrity and reliability of our system of justice when the defendant determines as a trial tactic that the instruction will benefit him by assuring the jury that no adverse inference may be inferred from his failure to take the stand. However, the same instruction is not required in every case where the defendant fails to testify. Accordingly, such an instruction could only change the outcome on retrial in a limited number of cases, and in most cases it would not change the outcome of the jury's verdict because of other relevant instructions, voir dire exam and closing and opening arguments which often stress that the burden is upon the state and that the defendant is not required to take the stand. Thus, the enhancement of the reliability of the fact-finding and the probability of injustice in the situation differs greatly from cases involving adverse inferences such as Griffin and fully retroactive cases involving absence of counsel at

arraignment (Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961)), at trial (Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)), and on appeal (Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963)) and cases involving judicial procedure for determining the voluntariness of a confession (Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1773, 12 L.Ed.2d 908 (1964)). Further, the enhancement of the reliability of truth-finding by such an instruction is not so great or substantial as to require this type of instruction in every case where the defendant fails to testify. Therefore, for the reason that enhancement of the reliability of the fact-finding process is not great or substantial and for the reason that this no inference instruction is not required in every case where the defendant fails to testify, the ruling in Carter should only be applied prospectively. See Stovall v. Denno, supra.

Secondly, the extent of the reliance which had been placed on the old rule in Oklahoma has been substantial. Title 22 O.S.1981, § 701 forbid any comment on the defendant's failure to testify and such was consistently held to be reversible error. Ellis v. State, supra; Villines v. State, supra; Brannin v. State, supra; Russell v. State, supra. Furthermore, Lakeside, supra invited the States to forbid trial judges from giving such instructions. Thus, the State of Oklahoma in good faith relied on 22 O.S.1981, § 701. See England v. Louisiana State Board of Medicine Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). See also Tehan v. Shott, supra.

The last important factor to consider is the effect of the administration of justice of the retroactive application of the new rule. A retroactive application of Carter would effect every state which had adopted a no comment rule and where the defendant had requested such an instruction.[1] The full retroactivity of

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2. At least five states prohibited the giving of such an instruction. Carter v. Kentucky, 450 U.S. at 290, note 2. They are Kentucky, see Carter v. Commonwealth, No. 79 S.C.-452 -Mr May 13, 1980 (unreported) aff. 598 S.W.2d 763, rev. 450 U.S. 288, 101

the Carter decision could be grave indeed. See Tehan v. Shott, supra. In most of those cases, witnesses and evidence would be no longer a available and retrial would be unlikely. As stated in Tehan:

> ". . . To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of the criminal law so devasting as to need no elaboration."

Accordingly, full retroactivity would impose a substantial burden upon the adminstration of justice.

The State also submits that cases, such as the instant case, which were on appeal when Carter was decided, should not require retrial based upon the Carter decision. Rather Carter, should apply prospectively and therefore be inapplicable to any case which was tried before Carter. Although, this Court in O'Connor v. Ohio, 382 U.S. 286, 86 S.Ct. 445, 15 L.Ed.2d 337 (1966) and in Tehan v. Shott, 382 U.S. at 409, note 2, 15 L.Ed.2d at 455, applied Griffin retroactively to all cases not yet final, the Fifth Amendment ruling in Griffin was not based upon a defendant's request but rather upon a blanket Fifth Amendment requirement. This Court has not held that the Fifth Amendment requires a no inference instruction in every case when the defendant fails to testify, but rather only in cases where the defendant requests such an instruction. Thus, a trial absent such an instruction has not been held to be unconstitutional when such an instruction is not requested. Therefore, the lack of such an instruction is not always fundamental error and the mere lack of an instruction does not substantially impair the trial's truth-finding function. For these reasons the holding in Carter, differs from the holding in Griffin and therefore, the same amount of retroactivity is not required.

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2. (Continued). S.Ct. 1112, 67 L.Ed.2d 241 (1981), Minnesota, see State v. Sandve, 279, Minn. 229, 232-234, 156 N.W.2d 230, 233-234, but see State v. Grey, 256 N.W.2d 74, 77-78 (the instruction may be necessary in some cases to prevent manifest injustice); Nevada, see Jackson v. State, 84 Nev. 203, 208, 438 P.2d 795, 798, Nev. Rev. State. § 175.181 (1979); Oklahoma, see Brannin v. State, 375 P.2d 276, 279-280 (Crim. App.), Hanf v. State, 560 P.2d 207, 212 (Crim. App.); and Wyoming, see Kinney v. State, 36 Wyo. 466, 472, 256 P. 1040, 1042.

In conclusion, Carter should be applied prospectively because; the absence of a no-inference instruction is not automatically fundamental error or a substantial impairment of the truth-finding fuction, the Court of Criminal Appeals relied on stautory and case law which held that such instructions were reversible error, this Court's ruling is a new ruling which overturned existing state statutory and case law, the administration of justice would be affected and the ruling in Carter differs from the ruling in Griffin in the degree its ruling affects the enhancement of the reliability of the fact-finding process at trial.

III

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE A FINDING OF RETROACTIVITY WOULD NOT AFFECT THIS DEFENDANT.

A finding by this Court that Carter v. Kentucky is retroactive would not affect this defendant because he did not request a written instruction nor did he obtain a ruling on his oral instruction and thus his personal claim to retroactivity of this ruling is barred based on a state procedural rule.[3] Therefore, the Court should not exercise its discretionary jurisdiction to answer a hypothetical question, the answer of which would not affect the defendant's conviction.

CONCLUSION

While this Court's Rule 17 is, by its own terms, not exclusive in setting out grounds for exercise of the Court's discretionary jurisdiction, it does provide guidance as to the importance of the cases this Court will consider. The present case confronts the Court with no split among the Circuits or between a Circuit and the highest court of any State. Nor does the Court need to exercise its supervisory powers herein. Although, the

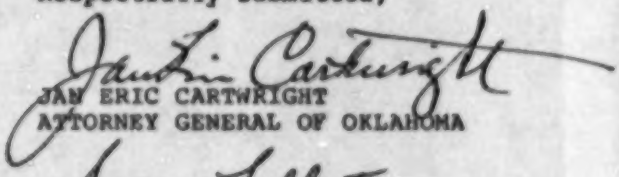
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3. See Graves v. State, 563 P.2d 646 (Okl.Cr. 1977); Lane v. State, 579 P.2d 991 (Okl.Cr. 1978); Luckey v. State, 529 P.2d 994, 996 (Okl.Cr. 1974). See also note 1, supra.

defendant raises a federal question it does not require the attention of this Court. The State court below has acted in accordance with decisions of this Court and has found that the petitioner's rights have not been violated. This case simply does not merit expenditure of the Court's scarce resources. Certiorari should be denied.

The State, having answered the petitioner's assignments of error by both argument and citation of authority, respectfully requests this Honorable Court to deny the petitioner's writ of Certiorari.

Respectfully submitted,



JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA



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ATTORNEYS FOR RESPONDENT

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
: ss.
COUNTY OF OKLAHOMA)

Susan Talbot, being first duly sworn, upon her oath does state:

1. That I am an Assistant Attorney General for the State of Oklahoma and one of the attorneys of record in the above-styled case representing the Petitioner, State of Oklahoma.

2. That on July 9, 1982, prior to 5:00 p.m., Central Standard Time, I caused to be placed forty (40) copies of the above Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals in an envelope properly addressed to the Clerk of this Court, with postage prepaid, which was deposited in the United States Mail in Oklahoma City, Oklahoma.

3. 1 Copy of the foregoing Petition were mailed, postage prepaid to:

Gary Peterson, Esq.
510 Fidelity Plaza
Oklahoma City, OK 73102

4. All parties required to be served have been served.

Further affiant sayeth not.

Susan Talbot
SUSAN TALBOT

Subscribed and sworn to before me this 9th th day of July, 1982.

Martha G. Simon
Notary Public

My Commission Expires:
September 14, 1985